84-665

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

J. A. MASSARO, WILLIAM S. KELTON, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL and RICHARD W. HESS, individually and as representatives of engineers similarly situated,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAIL OPERATIONS, and J. P. CARBERRY,

Respondents.

ON WRIT OF CERTIORARI TO THE SPECIAL COURT UNDER THE REGIONAL RAIL REORGANIZATION ACT OF 1973

PETITION FOR WRIT OF CERTIORARI

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29pp

Question Presented

1. Can a Union trade off a date of hiring seniority system without due process to those adversely affected by the change?

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Memorandum Opinion of the Special Court is printed in Appendix "A" hereto, infra, page 1a. The Order of the Special Court dismissing the Petition is printed in Appendix "A" hereto, infra, page 13a.

Jurisdiction

The Judgment of the Special Court under the Regional Rail Reorganization Act of 1973 was entered on July 30, 1984. Judgments of the Special Court are reviewable upon

petition for a writ of certiorari to this Court, as more specifically set forth in 45 U.S.C. §1105(b). The petition for a writ is timely pursuant to 28 U.S.C. §2101(c).

Statutes Involved

Rail Passenger Service Act (RPSA), §§508 through 510 inclusive, as amended by §1145 of the Northeast Rail Service Act of 1981 (NRSA), Pub. L. #97-35 (August 31, 1981), 95 Stat. 357, 669; 45 U.S.C.S. §§588, 1102 and 1105. These statutes are set forth in Appendix "B" hereto, infra, pages 15a-19a.

Statement of Case

Petitioners had been employed by Consolidated Rail Corporation. Respondent, New Jersey Transit, was to commence operations on January 1, 1983. After a statutory arbitration award dated October 14, 1982, which set forth the seniority to which they would be entitled if they elected to be employed by New Jersey Transit (Date of Hiring Seniority), Petitioners opted for employment with New Jersey Transit. Thereafter, and in December of 1982, Respondent Union and the Union's Vice President, Respondent Carberry, traded off their anticipated seniority rights for a quota type system based on historic factors. The arbitrator, ignoring that this was a statutorily controlled arbitration, accepted the revision on December 14, 1982 because the parties had so agreed, and modified the arbitration award by instituting the "quota" system. The Special Court denied the Petitioners' prayer for a declaratory judgment reinstating the original arbitration award.

Reasons for Granting Writ

In *Firefighters Local Union No. 1784* v. *Stotts*, decided here on June 12, 1984, the Court recognized the seniority rights of adversely affected employees even though by

Court order and even though Title VII of the Civil Rights Act of 1964 provided a substantive basis for attacking the prevailing seniority system. Seniority rights belong to individuals and Unions should not be permitted to trade off an "existing" seniority system without due process for those employees adversely affected.

In the instant case a "date of hiring" seniority system for operating a new railroad came into existence on October 14, 1982 as the result of a statutory arbitration decree, and Petitioners literally changed their employment positions from Consolidated Rail Corporation in reliance thereon. Unions and management must not be permitted to arrogate to themselves, even though by agreement, powers which are forbidden to the Courts, and the arbitrator had no power to change his award after two months, during which time Petitioners had acted. The attempt to give adversely affected employees a hearing in 1983, after the railroad was operational, was a subterfuge and is not the kind of due process required. The controversy is not moot because the Petitioners, and many other Engineers similarly situated, continue to sustain damage.

CONCLUSION

For the reasons set forth, Petitioners respectfully pray that a writ of certiorari issue to review the Judgment of the Special Court.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Memorandum Opinion of the Special Court

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

§ 1152 Panel—C.A. No. 84-2

(Filed August 8, 1984)

J. A. MASSARO, WILLIAM S. KELTON, A.C. SCOTT, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL, ROBERT E. STRUCK, RICHARD W. HESS and E. W. MICHAEL, JR., individually and as representatives of engineers similarly situated,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAI OPERATIONS, and J. P. CARBERRY,

Respondents.

MEMORANDUM OPINION

This action is before the court on the petition of eleven locomotive engineers employed by respondent New Jersey Transit Rail Operations (NJT) and holding seniority rights on Consolidated Rail Corporation (Conrail) for review of an arbitrator's award as amended on December 14, 1982 by Neutral Referee Richard R. Kasher pursuant to Section 508 of the Rail Passenger Act (RPSA) as amended by the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35 (August 31, 1981), 95 Stat.

357, 669. 45 U.S.C. § 588.[1] The amendment to the award which is challenged relates to the seniority system applicable to engineers transferred from Conrail to NJT. The petition names as respondents the Brotherhood of Locomotive Engineers (BLE), the union representing Conrail's engineers, J.P. Carberry (Carberry), one of BLE's Vice Presidents and representative to the § 508 proceedings, and NJT.[2] Petitioners seek a declaration that the amendment to the award is null and void and that the original award of October 14, 1982 is in full force and effect as of January 1, 1983. Oral argument was heard on June 6, 1984. For the reasons stated herein, the petition is dismissed.

Background

As this court has noted in earlier cases, NRSA amended RPSA so as to provide for the orderly transfer of commuter services from Conrail to various commuter authorities. Sections 508 through 510 of RPSA prescribe the methods by which Conrail employees were to be transferred to Conrail's successors. Because a detailed description of these sections and of the arbitration proceedings involved in this case appears in previous opinions of this court,[3]

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[1] This court has dismissed petitions for review of other aspects of Kasher's original award in *United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority*, 555 F. Supp. 1382 (Regional Rail Reorg. Ct.), *cert. denied*, 104 S. Ct. 96 (1983) (*UTU* v. *SEPTA*) and *New Jersey Transit Rail Operations, Inc.* v. *International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers and Helpers*, 550 F. Supp. 1327 (Regional Rail Reorg. Ct. 1982) (*NJT* v. *IBB*).

[2] Although originally named in the petition, Referee Kasher was dismissed as a party respondent by order of this court dated May 29, 1984 and Martin E. Robins, NJT representative to the § 508 proceedings, was dismissed as a respondent by notice of petitioners on March 28, 1984.

[3] *See* note 2, *supra; see also United Transportation Union* v. *Metro-North et al.*, 554 F. Supp. 429 (Regional Rail Reorg. Ct. 1983).

we will only briefly review that background as it applies to this action.

Section 508 of RPSA provided for the negotiation of an implementing agreement by Conrail, the commuter authority which was to assume Conrail's commuter operations effective January 1, 1983 (in this case, NJT) and the representative for each craft or class of Conrail employees to be transferred (herein BLE). Further, § 508 provided for arbitration of an implementing agreement where an agreement could not be negotiated by August 1, 1982. Following negotiation or arbitration of the implementing agreement, § 510 of RPSA required negotiation of a collective bargaining agreement. 45 U.S.C. § 590.

The BLE and NJT were unable, pursuant to this scheme, to negotiate an implementing agreement for engineers to be transferred from Conrail to NJT and Neutral Referee Kasher was appointed to determine the agreement by arbitration pursuant to § 508. By telegram of September 17, 1982, Kasher set up a schedule for the procedural meeting and the submission of proposed implementing agreements. Respondents BLE and Carberry point out that among the several preliminary determinations made by Kasher was the conclusion that the proceeding was in the "nature of an interest arbitration" and that Kasher would "exercise the arbitrator's right to confer ex parte with party representatives, as designated in accordance with Paragraph (3)." Paragraph (3) required each party to designate two representatives; BLE designated respondent Carberry and T.J. Cavan, BLE general chairman on Conrail.[4]

Following briefing by the parties and oral argument conducted at a public hearing, Kasher entered his Decision and Award on October 14, 1982. In his award, Kasher created a two-step process based on seniority in order

[4] Affidavit of J.P. Carberry, March 16, 1984 ("Carberry Affidavit") at ¶¶ 14, 16.

to determine first, which employees were to come to NJT and second, the seniority method to be used after the transfer had occurred. The award provided that an order selection list was to be developed by alternating employees based on their level of seniority with their respective seniority districts at Conrail considering the size of each district. The order selection list would then be used to determine which employees were to be transferred to NJT.[5] Once the employees were transferred, seniority was to be determined on the basis of the employees' "earliest retained seniority dates as enginemen with Conrail or a Conrail predecessor railroad" (hereinafter "date of hire").[6]

Shortly after the issuance of the award the BLE sought clarification based on the belief that the date of hire portion of the award was inconsistent with preceding sections as well as with other arbitration decisions. In a letter to Kasher dated October 25, 1982, respondent Carberry wrote as follows:

> During the presentation of oral testimony, it was my understanding that the arbitrator would make himself available for Award clarification if any of the parties so desired. Therefore, I am requesting that the parties either meet or arrange for a multiple phone conference to review paragraph *IV Seniority*.[7]

Sometime during this same period the BLE asked NJT to agree to change the seniority system to be used after the transfer occurred from the date of hire system contained in the Kasher award to the order selection list method. Although NJT was agreeable to the change pro-

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[5] Kasher's two-step process as well as the general procedure for establishing an order selection list is described in *UTU* v. *SEPTA*, 555 F. Supp. at 1385.

[6] Implementing Agreement at p. 10, Exhibit 1 to Petition.

[7] Carberry Affidavit, Exhibit I.

posed by BLE, the parties thought that because there was a formal arbitration award it was appropriate for the change to be ratified by the neutral referee.[8]

On December 14, 1982, a conference call was held between Kasher and the representatives of NJT, BLE and Conrail at which time the parties informed Kasher that they had agreed to amend the seniority provisions in the Implementing Agreement and requested that Kasher confirm that amendment by writing. After the phone conference, Kasher sent a telegram to the parties which stated that "in view of the agreement by the parties [the neutral referee] hereby amends the award and establishes the existing order selection list as the NJTRO/BLE seniority roster effective January 1, 1983." [9] On December 30, 1982, BLE and NJT reached a § 510 collective bargaining agreement which incorporated the amendment to the award so as to provide for an order selection list seniority system. This instrument, however, was not ratified under BLE's Constitution until December 28, 1983.[10]

Some of the petitioners complained on December 29, 1982 to the BLE International President, John F. Sytsma that Kasher's reconsideration was unwarranted and that the method by which the award was amended was improper. Consequently, by letter dated February 22, 1983, Sytsma requested that Kasher reconvene the § 508 proceeding "in order to formally hear and render a decision on reconsideration in a more traditional form." [11] By authority of the National Mediation Board, Kasher reconvened the pro-

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[8] The record is unclear as to whether BLE initially sought clarification of the award because of its belief that the award was inconsistent or because it had reached an agreement with NJT regarding the change in the seniority system.

[9] Carberry Affidavit, Exhibit J.

[10] Carberry Affidavit at ¶¶ 32, 45 and Exhibit T.

[11] Carberry Affidavit, Exhibit O.

ceedings on May 19, 1983 and in attendance were the representatives of NJT, BLE and Conrail as well as approximately twenty individuals who were employed as engineers on NJT. At this hearing, petitioners advocated the date of hire system while opponents supported the order selection list method.

On March 2, 1984, following commencement of this action, Referee Kasher issued his findings upon reconsideration. After reviewing all of the arguments presented at the May 19, 1983 hearing, Kasher concluded that no basis had been established to justify a change in the order selection list system agreed to by the parties and confirmed in the December 14, 1982 award.[12]

The basis of petitioners' challenge to the amended award is that it was improper to substitute the order selection list in lieu of the "traditional" date of hire roster by ex parte action without the knowledge or consent of petitioners or other individuals represented by the BLE. Petitioners further assert that the May 19, 1983 hearing was merely "cosmetic" in that Kasher was expected to reaffirm his amendment not to change it.[13] In their motion for summary judgment, petitioners argue that the arbitrator failed to comply with the statute's requirements by revising his award at the urging of the respondents. Petitioners also maintain that the respondents were estopped from abrogating the date of hire method as expressed in the original award because this court upheld that method in *UTU* v. *SEPTA* and because choices already had been made as to where to work based on the original award. Finally, petitioners assert that there is no logical basis for the

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[12] Affidavit of James S. Baker, March 19, 1984 ("Baker Affidavit"), Exhibit A.

[13] *See* Petition at ¶ 22. Petitioners base this contention on respondent Carberry's comments at the May 19, 1983 hearing that the arbitrator's duty was "to clear up the reconsideration, what it means, not to change it." Carberry Affidavit, Exhibit Q at p. 78.

amendment to the award as it causes inefficient and inequitable results.

Respondents BLE and Carberry (hereinafter "BLE"), on the other hand, maintain that the order selection list method is incorporated in the § 510 collective bargaining agreement and is a fair and equitable method for allocating seniority standings. BLE claims that petitioners lack standing to set aside that agreement between the designated bargaining representatives because the power to grant and alter seniority rights has been given to the bargaining agents exclusively. BLE's second argument is that the December 14, 1982 order removing the obvious conflict between the provisions of the implementing agreement was proper and should be upheld, particularly in light of this court's narrow standard of review. Even if the December 14, 1982 proceeding was improper in some respect, BLE contends that the May 19, 1983 hearing cured any improprieties by giving petitioners a full and fair opportunity to be heard. Finally, BLE maintains that petitioners' claims are barred by the applicable limitations period and by the doctrines of estoppel, waiver and laches.

Similarly, respondent NJT asserts that the § 510 collective bargaining agreement rather than the implementing agreement governs the relationship between NJT and its employees; it stresses the transitional nature of the implementing agreement. Secondly, NJT argues that individual employees like the petitioners do not have a private cause of action to enforce the provisions of § 508 because the union is the party named in the statute to protect employee's rights. Furthermore, petitioners' claims are barred by the doctrine of laches, NJT asserts, because the unreasonable delay in bringing this action could result in a disruption in NJT's operations. NJT concludes that, in any event, determination of the order selection list method was fully within the arbitrator's discretion pursuant to § 508.

In reply, petitioners claim that a § 508 agreement had to be negotiated by the parties before August 1, 1982 and that after that date, all matters in dispute had to be resolved by the referee. As a result, petitioners urge, any agreement reached by the respondents after August 1, 1982 was "ultra vires."

Discussion

As we have discussed on several prior occasions, this court has original and exclusive jurisdiction over actions involving interpretation of § 508 of RPSA pursuant to the jurisdiction found in § 1152(a) of NRSA. *UTU* v. *SEPTA*, 555 F. Supp. at 1387 (citing authorities). Although the parties urge the court to examine the circumstances of this case in a variety of ways, this court has stated the applicable test upon review in the following terms:

> This Court has held that judicial review of a neutral referee's award under §508 is extremely limited and that petitioner must meet a heavy burden before it can succeed in having a referee's award set aside. *NJT* v. *IBB*, 550 F. Supp. at 1329. Section 508(d)(3) provides that such an award is to be "final and binding to the same extent as an award of an adjustment board under §3 of the Railway Labor Act". Judicial review under that section is limited to consideration of whether the arbitrator failed to comply with the statute's requirements, failed to act within his jurisdiction or acted corruptly. [*UTU* v. *SEPTA*, 555 F. Supp. at 1387 (citing authorities).]

In *UTU* v. *SEPTA*, this court had occasion to review §508(c)(5) which is also the basis for petitioners' challenge to the amended award in this case. That section involves the neutral referee's task to:

> determine the procedure for determining the seniority of such employees in their respective class or classes in Amtrak Commuter or with a commuter authority which shall, *to the extent possible,* preserve their prior seniority rights. [Emphasis added.]

In determining that Kasher complied with the statute's requirements in *UTU* v. *SEPTA,* the court found that he had "acted within the limits of his discretion" pursuant to § 508(c)(5). *Id.* at 1388.

Petitioners' argument appears to be that since this court upheld the date of hire method, any other seniority system is necessarily contrary to the provisions of the statute. This argument overlooks both the reasoning of this court in *UTU* v. *SEPTA* as well as the express language of § 508(c)(5). This court found that "Congress granted the neutral referee the discretion to determine the level of protection to be accorded to prior seniority rights in that the phrase " 'to the extent possible' in § 508(c)(5) clearly contemplate[s] that preservation of prior seniority rights is to be balanced against other considerations." *Id.*[14] Thus, it is clear that there is more than one possible seniority system which will satisfy the requirements of § 508(c)(5).

In his findings upon reconsideration Kasher noted that although BLE consistently advocated an order selection list system throughout the arbitration proceedings, Kasher imposed a simple date of hire system because NJT claimed that it could not live with a complex system. In view of the fact that NJT now agreed to the more complex system (order selection list), however, Kasher indicated that he had no objection to NJT and BLE entering into such an agreement. Kasher's findings also pointed out that the argument advanced by petitioners and others that a simple

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[14] The court also discussed the concept of prior seniority rights in *UTU* v. *SEPTA* and thus, will not repeat that discussion here.

date of hire system existed previously on any of the predecessor railroads which build the Conrail system was untrue. After a thorough discussion of the complexities of the process of changing seniority and a recognition that other seniority methods exist that are equitable, Kasher concluded that the order selection list method was also a fair and equitable arrangement and that there was no showing that favoritism played a role in the parties' agreement or in the issuance of the amended award.[15] Examination of Kasher's findings upon reconsideration indicates that he gave due consideration to the issue of preserving prior rights; the court finds that Kasher complied with the requirements of § 508(c)(5) and acted within his discretion in amending the award to provide for the order selection list seniority system.

Although far from clear in petitioners' submissions, it appears that they also challenge Kasher's amended award on the grounds that he either failed to act within his jurisdiction or acted corruptly when he amended the award at the request of respondents without affording petitioners an opportunity to be heard.[16] Petitioners' argument is without merit. As previously mentioned, and as petitioners readily admit,[17] this was not a grievance arbitration and Referee Kasher had informed the parties that he would be available for award clarification. Thus, when Kasher was informed by the representatives of NJT and BLE during the phone conference on December 14, 1982 that they had reached an agreement concerning the method of

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[15] Baker Affidavit, Exhibit A.

[16] Any notion that Kasher exceeded his jurisdiction under § 508 by infringing upon a subject more properly resolved by the § 510 collective bargaining process must be rejected as it was in *UTU* v. *SEPTA*, 555 F. Supp. at 1389.

[17] *See* Petitioner's memorandum in support of motion for declaratory judgment at p. 2.

seniority, Kasher told them that "as they were the owners of the agreement, which in this case had been reached through an arbitration award, that they had the authority to change that arbitration by mutual consent." [18] This court cannot say that Kasher acted corruptly or beyond his jurisdiction when he amended the award to reflect the agreement reached among the duly designated representatives to the arbitration proceedings.

Moreover, petitioners' claim that the May 19, 1983 hearing was "cosmetic" is contradicted by the transcript of those proceedings and by Kasher's findings upon reconsideration. At the hearing, Referee Kasher told those present that he was giving them an opportunity to put their views on the record[19] and his findings, in which he determined that it was appropriate to consider *all* of the arguments presented at the hearing, indicate that the hearing was not merely a formality.[20] The court concludes that Referee Kasher made an independent determination that the order selection list system complied with the mandate of § 508(c)(5). The court also notes that any claim of impropriety is refuted by the fact that a collective bargaining agreement which incorporated the same order selection list system provided for in the amended award was ratified under the BLE Constitution on December 28, 1983.[21]

Conclusion

As Referee Kasher observed, the fact that some members of petitioners' craft of engineers are dissatisfied with the

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[18] Baker Affidavit, Exhibit A. at p. 14.

[19] Carberry Affidavit, Exhibit Q at pp. 24-25.

[20] Baker Affidavit, Exhibit A at pp. 8-9.

[21] *See* note 10, *supra*. Moreover, as respondents correctly observe, a § 510 "agreement may modify the seniority provisions of a § 508 implementing agreement." *UTU* v. *SEPTA*, 555 F. Supp. at 1389.

order selection list method "is not surprising, and, in fact, is not to be unexpected in any proceeding where employees with seniority rights on one property are transferred to another property where those seniority rights may undergo change or modification." [22] However, "[t]his court may not substitute its judgment for that of the referee" [23] and petitioners' dissatisfaction does not alter this court's role in reviewing the neutral referee's award pursuant to § 508. Based on the foregoing, it cannot be said that Kasher failed to comply with the statute's requirements or acted corruptly or beyond his jurisdiction simply because he amended the award to provide for a seniority system different from the one advocated by petitioners. Petitioners have not met their burden; the petition must be dismissed.

/s/ OLIVER GASCH
Oliver Gasch
Presiding Judge

/s/ WILLIAM B. BRYANT
William B. Bryant
Judge

/s/ CHARLES R. WEINER
Charles R. Weiner
Judge

Date: July 30, 1984

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[22] Baker Affidavit, Exhibit A at pp. 14-15.

[23] *NJT* v. *IBB*, 550 F. Supp. at 1331.

APPENDIX "A"

Order of the Special Court Dismissing Petition

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

§ 1152 Panel—C.A. No. 84-2

(Filed August 8, 1984)

J. A. MASSARO, WILLIAM S. KELTON, A.C. SCOTT, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL, ROBERT E. STRUCK, RICHARD W. HESS and E. W. MICHAEL, JR., individually and as representatives of engineers similarly situated,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAIL OPERATIONS, and J. P. CARBERRY,

Respondents.

ORDER

For the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that the respondents' motion for summary judgment is granted; and

FURTHER ORDERED that petitioners' motion for summary judgment is denied; and

Appendix "A"—Order of the Special Court Dismissing Petition

FURTHER ORDERED that the petition is dismissed.

/s/ OLIVER GASCH
Oliver Gasch
Presiding Judge

/s/ WILLIAM B. BRYANT
William B. Bryant
Judge

/s/ CHARLES R. WEINER
Charles R. Weiner
Judge

Date: 7/30/84

APPENDIX "B"

Statutes Involved

45 U.S.C.S. §588—

§588. Transfer of employees

(a) Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(b) Not later than May 1, 1982, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(c) Such negotiations shall—

(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

(2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;

(3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

(5) determine the procedure for determining the seniority of such employees in their respective

crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

(d) (1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an additional 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act [45 USCS § 153], and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

(e) If Amtrak Commuter transfers commuter service and properties to a commuter authority under section 506 of this title [45 USCS § 586], Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 [45 USCS § 797] to the same extent as if such employee had remained in the employ of Conrail.

Appendix "B"—Statutes Involved

45 U.S.C.S. §1102—

"§1102. Purpose

It is therefore declared to be the purpose of the Congress in this subtitle to provide for—

(1) the removal by a date certain of the Federal Government's obligation to subsidize the freight operations of Conrail;

(2) transfer of Conrail commuter service responsibilities to one or more entities whose principal purpose is the provision of commuter service; and

(3) an orderly return of Conrail freight service to the private sector."

45 U.S.C.S. §1105—

"§1105. Judicial review

(a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this subtitle;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this subtitle; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle.

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment."

NO. 84-665

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

J.A. MASSARO, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

1. Whether a petition for a writ of certiorari to review a judgment of the Special Court, filed more than seventy days after the judgment was entered, was filed in a timely manner where the statutory provision allowing a petition for a writ of certiorari to review a Special Court action, 45 U.S.C. §1105(b), requires that the petition be filed within twenty days after entry of the judgment.

2. Whether a commuter authority and a rail union may renegotiate seniority provisions contained in an agreement awarded pursuant to 45 U.S.C. §588 without granting a hearing to affected employees where 45 U.S.C. §588 does not give employees a right to be heard in the first instance.

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Respondents.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter comes before the Court on a Petition for a Writ of Certiorari by certain employees of respondent New Jersey Transit Rail Operations, Inc. (NJ Transit) to review a judgment of the Special Court (created pursuant to the Regional Rail Reorganization Act of 1973) upholding an amendment to an award made pursuant to

§508 of the Rail Passenger Service Act (RPSA). 45 U.S.C. §588. Section 508 was enacted as part of the Northeast Rail Services Act of 1981 (NRSA), Pub. L. No. 97-35 (August 31, 1981), 95 Stat. 357, 669, which among other purposes was enacted to accomplish the transfer of commuter rail operations in the Northeast from the Consolidated Rail Corp. (Conrail) to commuter authorities effective January 1, 1983. As part of the statutory scheme to accomplish the transfer §508 required an implementing agreement to be negotiated between commuter authorities and representatives of employees of Conrail to effect the transfer of employees from Conrail to commuter authorities. Section 508 required arbitration of the implementing agreement where an agreement could not be reached. Following negotiation or arbitration of the implementing agreement §510 of RPSA, 45 U.S.C. §590, required negotiation of a collective bargaining agreement.

In the instant case, when NJ Transit and respondent Brotherhood of Locomotive Engineers (BLE) could not reach an agreement the matter was submitted to arbitration and an award was issued on October 14, 1982 (Pa3).* After the October 14, 1982 award, the BLE and NJ Transit reached an agreement on a seniority provision different than that contained in the award. The matter was then resubmitted to the neutral referee who on December 14, 1982 amended the award pursuant to the parties agreement (Pa4-5). In the winter of 1984, petitioners sought review in the Special Court of the amended award. On the motions of respondents NJ Transit and BLE the Special Court dismissed petitioners' petition for review finding the amended award to be consistent with the statute. The order dismissing the complaint was filed on August 8, 1984 (Pa13).

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* "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari.

On October 25, 1984, 78 days after dismissal order was entered, petitioners filed their petition for a writ of certiorari with the Court. Petitioners do not dispute the Special Court's holding that the amended award, like the initial award, complied with the provisions of 45 U.S.C. §588. They merely argue that prior to any change in the award, the individual members of the union were entitled to "due process."

Summary of Argument

The statute which provides for judicial review of actions taken pursuant to NRSA, including actions taken pursuant to 45 U.S.C. §588, clearly provides that a petition for a writ of certiorari to review a decision of the Special Court "shall be filed not more than twenty days after entry of such order or judgment." 45 U.S.C. §1105(b). Because the petition in this matter was filed more than twenty days after the judgment of the Special Court, the petition is out of time.

It is well settled that a union and employer are free to renegotiate provisions of a collective bargaining agreement related to seniority. There is no basis for petitioners' claim that they are entitled to due process prior to any such renegotiation.

ARGUMENT

A. This Court lacks jurisdiction to grant a writ of certiorari because the petition for the writ was filed out of time.

It has long been recognized that the Court lacks jurisdiction to entertain a petition for a writ of certiorari that is not filed within the statutory time limits. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923). 45 U.S.C. §1105(b) clearly provides that a petition for a writ of certiorari to review a decision of the Special Court in any action referred to in that section "shall be filed not more than twenty days after entry of such order or judgment." In this case petiitoners concede that jurisdiction is based on 45 U.S.C. §1105(b). Therefore, the Court lacks jurisdiction to hear this petition for a writ of certiorari because it was filed more than fifty days after the twenty day time limit expired.

B. Petitioners had no due process rights with respect to a renegotiation of seniority provisions between respondents NJ Transit and BLE.

Citing *Fire Fighters Local Union No. 1784* v. *Stotts*, —— U.S. ——, 81 L.Ed.2d 483 (1984), petitioners argue that "seniority rights belong to individuals and Unions should not be permitted to trade off an 'existing' seniority system without due process for those employees adversely affected." What the Court held in *Stotts* was that a district court may not require layoffs of white employees when a bona fide seniority system would require the layoff of black employees with less seniority. The decision was based on a statutory interpretation of §703(h) of Title VII of the Civil Rights Act of 1964. That statute is in no way

involved in this matter, and therefore, the *Stotts* decision has absolutely no applicability to the due process claim asserted by petitioners.

While there is no case law to support the principle that an employer and union may not renegotiate seniority provisions without giving a due process hearing to affected employees, this Court long ago held that seniority rights may be changed by agreements between unions and employers. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953); *Humphrey* v. *Moore,* 375 U.S. 335 (1964). In this case the seniority provision was awarded pursuant to a statute, 45 U.S.C. §588, which itself contained no requirement of a hearing for affected employees. Thus, there is no case law or statute which provides any support for petitioners' due process claim.

Petitioners have not disputed the finding of the Special Court that the amended seniority system was in complete compliance with the requirements of 45 U.S.C. §588. They merely argue that the seniority provisions could not be changed without due process. Because seniority rights have always been viewed as a subject of continuing negotiations between the union and employer, and because 45 U.S.C. §588 did not require a hearing for the initial negotiation of seniority provisions in the agreement, it is clear that no property rights were created which would require a due process hearing prior to a change in the seniority system.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of writ of certiorari should be denied.

Respectfully submitted,

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No. 84-665

In the Supreme Court of the United States

October Term, 1984

J. A. MASSARO, WILLIAM S. KELTON, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL and RICHARD W. HESS, individually and as representatives of engineers similarly situated,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAIL OPERATIONS, and J. P. CARBERRY,

Respondents.

ON WRIT OF CERTIORARI TO THE SPECIAL COURT UNDER THE REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND J. P. CARBERRY IN OPPOSITION

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QUESTION PRESENTED

Whether the Special Court correctly held that the neutral referee's award providing for an order selection list seniority system, which award was entered pursuant to Section 508 of the Rail Passenger Service Act of 1973, as amended by the Northeast Rail Service Act of 1981, 45 U.S.C. §588, could not be set aside upon any of the grounds for limited review specified in that statute.

PARTIES INVOLVED

Respondent Brotherhood of Locomotive Engineers (BLE) is the bargaining representative for the craft of locomotive engineers employed by respondent New Jersey Transit Rail Operations (NJTRO), and respondent Carberry is an officer of BLE. Petitioners are locomotive engineers employed by NJTRO.

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No. 84-665

In the Supreme Court of the United States

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J. A. MASSARO, WILLIAM S. KELTON, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL and RICHARD W. HESS, individually and as representatives of engineers similarly situated,

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAIL OPERATIONS, and J. P. CARBERRY,

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BRIEF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND J. P. CARBERRY IN OPPOSITION

OPINIONS BELOW

The opinion of the Special Court under the Regional Rail Reorganization Act is not reported as yet, and is printed in Appendix A to the petition, pp. 1a-12a.

OBJECTION TO JURISDICTION

The judgment of the Special Court under the Regional Rail Reorganization Act of 1973 is dated July 30, 1984 and was filed on August 8, 1984. Judgments of the Special Court are reviewable upon petition for a writ of certiorari as set forth in 45 U.S.C. §1105(b), which states in part:

> "A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States . . . . Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment."

The petition was filed on October 22, 1984, or more than 20 days after the judgment below was entered. The timely application for certiorari is jurisdictional. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923). It has long been held that a petition for a writ of certiorari should be dismissed if not taken within the time prescribed. *Whitsitt v. Union Depot and Rail Co.*, 122 U.S. 363 (1887). Accordingly, the petition should be dismissed.

STATEMENT

Petitioners were employed as engineers by Consolidated Rail Corporation (Conrail) and continue to hold flowback rights and seniority with that railroad. On January 1, 1983, certain commuter operations previously performed by Conrail in the State of New Jersey were assumed by respondent NJTRO pursuant to Section 506 of the Rail Passenger Service Act (RPSA), as amended by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. §556.

Petitioners began employment as engineers with NJTRO on that date and have continued to work in that capacity for that respondent.

Respondents BLE and NJTRO were unable to negotiate by August 1, 1982, an implementing agreement for engineers to be transferred from Conrail to NJTRO as provided in the 1981 statutory scheme, and a §508 neutral referee was appointed to engage in the interest arbitration prescribed by the statute. The arbitrator retained the right to confer ex parte with the representatives of BLE and NJTRO and to be available for clarification. The arbitrator developed a two-tier process to determine the Conrail engineers transferring to NJTRO and the seniority method to be used after the transfer had occurred. The transfer was to be accomplished by an order selection list or equity allocation list developed by inserting the names of employees based on their level of seniority with their respective seniority district on Conrail into the slots awarded their district by reason of the work equity or contribution of that district to the new operation on NJTRO. Once transferred, seniority was to be determined on the employees' retained date of hire with Conrail or any of its predecessors.

Due to a conflict in the award, BLE sought clarification. NJTRO agreed to a one-tier scheme or to change the seniority system to be used after the transfer from a date of hire roster to the order of selection list used upon the transfer. The neutral ratified the change on December 14, 1982. Section 510 of RSPA also required a single bargaining agreement. On December 30, 1982, respondents signed the §510 collective bargaining agreement which incorporated the order selection list seniority system.

When some of the petitioners complained to BLE's president about the change, he requested the neutral to re-

convene the §508 proceeding in order to formally hear and render reconsideration in a more traditional form. By order of the National Mediation Board, the referee did reconvene the proceedings and conducted a full hearing. Subsequently, the neutral issued his findings upon reconsideration and concluded that no basis had been established to justify a change in the order selection list system agreed to by the parties and confirmed in the December 14, 1982 award.

The Special Court refused to substitute its judgment for that of the referee in the §508 award and dismissed the petition to review on the ground that petitioners had not met the requisite burden in having a referee's award set aside.

REASONS FOR DENYING THE WRIT

This case does not involve any new or important question of law. As in the case of all railway labor arbitration, the decision on the merits by the §508 arbitration is final and binding on the parties, and review of a §508 award is based upon the same standards contained in Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q). The Special Court held that review of a neutral arbitrator's award under §508 arbitration is quite limited and that petitioners had an extreme burden in setting aside the award. Based upon the arbitrator's findings and the court's independent assessment of the record, the Special Court decided that the arbitrator had not failed to comply with the statute's requirements or acted corruptly or beyond his jurisdiction simply because he provided a seniority system different from the one advocated by petitioners. Further, the Special Court held that the respondent collective bargaining agents had the right under §510 of the

Rail Passenger Service Act of 1973, as amended by the Northeast Rail Service Act, 45 U.S.C. §590, to adopt and codify that seniority system in the negotiated collective bargaining agreement. Clearly, the decision below does not raise any question that deserves review by this Court.

Contrary to the sole ground for review contained in the petition, the decision of the Special Court is not a departure from the decision of this Court in *Firefighters Local Union No. 1784 v. Stotts,* ..... U.S. ....., 104 S. Ct. ....., 81 L. Ed. 2d 483 (1984), which case in any event is inapplicable to the matter at bar. In fact, the decision below is consistent with the prior holdings of this Court and is not in conflict with any decision of the other courts.

In exercising the original and exclusive jurisdiction given it by Section 1152(a) of the Northeast Rail Service Act, 45 U.S.C. §1105, over actions involving Section 508 of the Rail Passenger Service Act, the Special Court, in this case as in all previous cases of this kind before it, has stated the applicable test upon review in the following terms:

> "The Court has held that judicial review of a neutral referee's award under §508 is extremely limited and that petitioner must meet a heavy burden before it can succeed in having a referee's award set aside. NJT v. IBB, 550 F. Supp. at 1329. Section 508(d)(3) provides that such an award is to be 'final and binding to the same extent as an award of an adjustment board under §3 of the Railway Labor Act'. Judicial review under that section is limited to consideration of whether the arbitrator failed to comply with the statute's requirements, failed to act within his jurisdiction or acted corruptly. [UTU v. SEPTA, 555 F. Supp. at 1387 (citing authorities).]" Pet. App. A, 8a.

In referring to the permissible review provided by Section 3 of the Railway Labor Act, which was incorporated as the standard for review of Section 508 awards, this Court in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), said in terms dispositive of this case:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601, 3 L Ed 2d 1460, 79 S. Ct. 1351 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. Gunther v. San Diego & A. E. R. Co. 382 U.S. 257, 15 L Ed 2d 308, 86 S. Ct. 368 (1975)."

This Court once again in *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 90 (1970), emphasized that "the scope of review of Adjustment Board decisions is 'among the narrowest known to the law.' " Stressing the need for an allegedly aggrieved party to meet the grounds for review prescribed by the statute, the Court said:

> ". . . [T]he dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) unequivocally states that the 'findings and order of the (Adjustment Board) shall be conclusive on the parties; and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. See, e.g. Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 263, (1965); Locomotive Engineers v. Louisville & Nashville R. Co., 373 U.S., *supra*, at 38; Union Pacific R. Co. v. Price, 360 U.S. 601, 616 (1959)." *Id.*, at 93-94.

There is no doubt that the Special Court applied a correct standard in reviewing the §508 award.

Petitioners' claim that the Special Court's decision conflicts with the recent decision of this Court in *Firefighters Local Union No. 1784 v. Stotts*, ... U.S. ....., 104 S. Ct. ....., 81 L. Ed. 2d 483 (1984), is also unavailing. This is not a race case, and does not involve a reading of Title VII of the Civil Rights Act of 1964. In *Stotts*, the issue was whether the district court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. 81 L. Ed. 2d at 495. By reason of that modification to the prior decree entered by the district court, the city was prevented from applying its seniority system in the manner it chose and the involved individuals lost competitive seniority. *Id.*, at 494 and 495, n.6. Here, petitioners would seek to devise a seniority system to deprive a minority group of employees of their competitive standings and also to set aside the arbitrator's award in order to prevent the state's rail commuter subsidiary and the bargaining representative of its employees from applying the seniority system in the manner chosen.

In this last respect, subsequent to the issuance of the §508 award, BLE and NJTRO entered into the collective bargaining agreement required by Section 510 of the RPSA, and incorporated the seniority provisions of the award upheld in the decision below. As the Special Court previously had held, "the creation of a seniority system for NJT employees is a proper subject of a collective bargaining agreement reached through the §510 process." *United Transportation Union v. Southeastern Pennsylvania*

Transp. Co., 555 F. Supp. 1382, 1389 (Sp. Ct. R.R.R.A. 1983), *cert. denied*, 104 S. Ct 96 (1983).

In fact, the seniority system adopted in the §508 award and bargained upon by the collective bargaining parties is not a novel one and has been upheld on numerous occasions by the courts . *See, e.g., Freeman v. Grand Int'l Broth. of Loc. Engineers*, 375 F. Supp. 81 (S.D. Ga. 1973), *aff'd*, 493 F.2d 628 (5th Cir. 1974); *Price v. Seaboard Coast Line R. Co.*, 332 F. Supp. 1093 (S.D. Ala. 1970), *aff'd*, 449 F.2d 1371 (5th Cir. 1971); *Smith v. Baltimore & Ohio R. Co.*, 485 F. Supp. 1026 (D. Md. 1980). It also has been used on Conrail. Thus, all this case involves is an attempt by petitioners to obtain seniority standing at the expense of the competitive seniority of others, which result would conflict with the rationale expressed in *Stotts*.

In sum, the language of the Special Court shows that petitioners' imagined harm does not accurately describe the award of the arbitrator or the holding of the court:

> "As Referee Kasher observed the fact that some members of petitioners' craft of engineers are dissatisfied with the order selection list method 'is not surprising, and, in fact, is not to be unexpected in any proceeding where employees with seniority rights on one property are transferred to another property where those seniority rights may undergo change or modification.' However, '[t]his court may not substitute its judgment for that of the referee' and petitioners' dissatisfaction does not alter this court's role in reviewing the neutral referee's award pursuant to §508. Based on the foregoing, it cannot be said that Kasher failed to comply with the statute's requirements or acted corruptly or beyond his jurisdiction simply because he amended the award to provide

for a seniority system different from the one advocated by petitioners." (Pet. App. A. 11a-12a).

Neither petitioners' dissatisfaction, nor this determination raises any issue which warrants review by this Court, and this case does not involve a situation meriting this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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